



Private Antitrust Litigation

in 27 jurisdictions worldwide

Contributing editor: Samantha Mobley

2008



Published by
GLOBAL COMPETITION REVIEW
in association with:

Anderson Mōri & Tomotsune
Baker & McKenzie LLP
Bell Gully
BSJP Brockhuis Schnell Jurczak Prusak Sp k
CHSH Cerha Hempel Spiegelfeld Hlawati
Cleary Gottlieb Steen & Hamilton LLP
De Brauw Blackstone Westbroek
DLA Nordic A/S
Eugene F Collins
Gilescu & Partenerii
Kim & Chang
Linklaters LLP
Maclay Murray & Spens LLP
Mannheimer Swartling
Marques Mendes & Associados
Mayer Brown LLP
McMillan Binch Mendelsohn LLP
Meitar Liquornik Geva & Leshem
Brandwein, Law Offices
Nomos Thessaloniki Law Firm
Roschier, Attorneys Ltd
Salans
Schellenberg Wittmer
SimmonsCooper Partners
Simpson Thacher & Bartlett LLP
SJ Berwin LLP

Hungary

Judith Vadász and Bernhard Kofler Senoner

CHSH Cerha Hempel Spiegelfeld Hlawati

Legislation and jurisdiction

1 How would you summarise the development of private antitrust litigation?

Economic competition was regulated for the first time in Hungary by Act V of 1923, which featured the main characteristics of the German UWG (Unfair Competition Act of 1909). Since then, competition rules have been further developed by Act LXXXVI of 1990 on the Prohibition of Unfair Market Practices, which was a significant step forward in the course of the harmonisation of Hungarian competition law with EU law principles, and thereafter by Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (the Competition Act). The Competition Act has been further amended by Act CIX of 2006 and Act LXXXII of 2007. These amendments of the Competition Act contain minor amendments and adjustments which are not related in any way to the topic of private enforcement.

Competence relating to competition law issues directly based on the Competition Act is divided between the Office of Economic Competition (the Competition Authority) and the county courts. Issues of unfair market practices fall within the competence of the county courts; other issues regulated by the Competition Act, such as, *inter alia*, cartels and abuse of dominant position fall primarily within the competence of the Competition Authority.

The most important amendment of the Competition Act (the amendment), which entered into force on 1 November 2005, brought clarification to various aspects of the private enforcement of damages claims. The amended Competition Act specifically provides for the possibility of direct civil law actions for damages arising from competition law infringements. Such private antitrust enforcement may take place before courts of regular competence without the need to involve the Competition Authority beforehand as to the question of whether a breach of competition law has occurred.

There are only a few court decisions covering private antitrust damages claims and there is no significant case-law regarding claims for damages based on breach of the competition rules on cartels and on abuse of dominant position. One of such decisions confirmed that a damages claim could be filed on the basis of an infringement of the Competition Act provided that the Competition Authority had previously confirmed such breach of law. In another decision, the court held that damages claims are also permissible if a violation of any of the provisions of the Competition Act has occurred.

2 Are private antitrust actions mandated by statute? If not, on what basis are they possible?

Applications for cease and desist orders and for damages with regard to unfair market practices on the basis of section 86 of the Competition Act may be filed with the relevant county court.

Claims for damages arising from the breach of other provisions of the Competition Act may be filed on the basis of the general rules of indemnification of the Civil Code and the Civil Procedure Act with the courts of regular competence (for details see question 4).

Uncertainties still exist, however, with respect to the competence of courts discussed above. Based on the language of the amendment, one could also argue that all issues related to competition law (ie, issues including damages claims) fall within the competence of the county courts. This uncertainty should be clarified by case law.

Further, civil law disputes sometimes involve the challenging of the validity of agreements which constitute a breach of the Competition Act. The legal basis for such actions is section 200(2) of the Civil Code which sets out that agreements concluded in breach of legal regulations are generally null and void.

3 If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

Relevant legislation: see question 2.

Relevant courts:

- in the first instance, county courts are competent for claims filed on the basis of chapter II (section 86) of the Competition Act. In such cases, regional courts serve as courts of appeal;
- claims for damages arising from the breach of other provisions of the Competition Act (chapters III–V) may be filed with the courts of regular competence, ie, if the value of the claim is below or equal to 5 million forints (approximately €18,000) it may be filed with the relevant local court in which case appeals are heard by the relevant county court, while if the value of the claim exceeds 5 million forints it may be filed with the relevant county court in which case appeals are heard by the relevant regional court; and
- in the case of civil law disputes involving the challenging of the validity of agreements, the competent courts are the local courts.

4 In what types of antitrust matters are private actions available?

In the case of a breach of the provisions prohibiting unfair market practices, individuals and undertakings may file petitions for cease and desist orders and claims for damages on the basis of section 86 of the Competition Act with the relevant county court.

In accordance with the general rules of tort, actions for damages may be filed on the basis of:

- unfair manipulation of consumer decisions;
- an agreement restricting economic competition; and
- abuse of a dominant position.

According to the related commentaries and legal literature, the provisions of the Competition Act relating to merger control are practically irrelevant in the context of private antitrust litigation as the breach of merger control regulations does not typically result in damages. It seems to be arguable, however, that damages claims should also be possible in this context on the basis of the general rules of tort (ensuring claims for damages arising out of any unlawful conduct which is in breach of any legal regulation).

5 What nexus with the jurisdiction is required to found a private action?

Any individual or legal entity, regardless of nationality or domicile, may in principle file an action for damages with the relevant Hungarian court provided that the defendant fulfils certain criteria. Generally, to found a basis for the jurisdiction of a Hungarian court the defendant must have a domicile or be resident in Hungary. In particular, actions against EU residents may be filed before Hungarian courts on the basis of Council Regulation 44/2001 on the jurisdiction and enforcement of judgments in civil and commercial matters.

In addition, pursuant to Hungarian conflict of law rules, Hungarian courts have jurisdiction with respect to a foreign defendant having domicile in a non-EU member state *inter alia* in the following cases:

- if the place of performance of the contractual obligation in question is in Hungary;
- for legal disputes relating to a tort if such tort was committed in Hungary, or if, as a consequence thereof, damage has occurred in Hungary;
- if a foreign enterprise has a branch or representative office in Hungary and the litigation pertains to the operations of the latter; or
- if the defendant owns assets in Hungary that may be subject to judicial execution.

6 Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Private actions can be brought against corporations and individuals, including in certain circumstances, those from other jurisdictions (see question 5).

7 If the country is divided into multiple jurisdictions, can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Not applicable.

Private action procedure**8** Are contingency fees available?

There is no explicit or implicit statutory regulation that would restrict or exclude the possibility of stipulating contingency fees for attorneys. Contingency fees are therefore available and not unusual in Hungary.

9 Are jury trials available?

Jury trials are unknown in the Hungarian court (judicial) system.

In Hungary, courts proceed with the involvement of professional judges. Trials before courts of first instance are generally heard by a single judge, whereas courts of second instance hear the cases in councils comprising three professional judges. Labour law cases are exceptions to this rule (in the first instance procedure two laymen accompany a professional judge).

10 What pre-trial discovery procedures are available?

Under Hungarian law, pre-trial discovery procedures may be requested by an interested party before initiating or during a civil lawsuit *inter alia* if:

- a discovery during the upcoming trial or at a later stage thereof would be unsuccessful or such discovery would be seriously hindered;
- the pre-trial discovery facilitates the completion of the trial within a reasonable period of time; and
- the other party has a warranty obligation for the deficiency of certain items.

The pre-trial discovery procedure is carried out in accordance with the general rules of taking evidence with minor differences, for example, if the pre-trial discovery procedure is initiated prior to the submission of the statement of claim, the local court competent based on the residence (seat) of the applicant, or the local court on the territory of which it is the most practical to have the pre-trial discovery procedure, has competence for such pre-trial discovery. The evidence obtained in the course of the pre-trial discovery procedure may be freely relied on by all parties during the entire lawsuit.

11 What evidence is admissible?

The Civil Procedure Act sets out the main forms of evidence admissible in civil proceedings, such as the statements of the parties, witness testimonies, expert opinions, (on-site) inspection, documents and other physical objects. This list is not, however, exhaustive. Any other form of evidence may also be permitted as there are no limitations or restrictions in this respect.

12 Are private actions available where there has been a criminal conviction in respect of the same matter?

Private actions before a civil court are available even if there has been a criminal conviction in respect of the same matter. It is also possible for criminal and civil procedures with respect to the same matter to be pending in parallel.

A civil law claim for damages arising from a criminal act may also be enforced in the course of the respective criminal procedure. Amounts recovered in a criminal procedure may not be repeatedly claimed in a separate civil procedure.

- 13** Can the evidence or findings in criminal proceedings be relied upon by plaintiffs in parallel private actions?

On the basis of the principle of ‘free use of evidence’ and judicial practice, evidence and findings of a criminal procedure can be freely relied upon in the parallel civil procedure.

Civil courts, however, do not have the authority to hold that the convicted person has not committed the criminal act if this was already established in a final and binding judgment delivered as a result of a criminal procedure. A claim for damages, however, may be awarded even if the criminal court has not convicted the person accused.

- 14** What is the applicable standard of proof and who bears the burden?

The Hungarian rules of civil procedure do not require a specific standard of proof. The court may freely assess the evidence in its entirety and deliver its judgment on the basis of such evidence at its own discretion.

Pursuant to the general rules of the Civil Procedure Act, the burden of proof lies with the party in whose interest it is that the court accepts certain facts or evidence to be true. No evidence is taken ex officio, except if otherwise provided by law.

The Hungarian law on damages is a so-called exculpation system, in the course of which the defendant has to prove that he/she behaved in a given situation as it is generally expected to exempt himself or herself from liability.

- 15** What is the typical timetable for class and non-class proceedings? Is it possible to accelerate proceedings?

As class actions do not exist under Hungarian law, the procedural deadlines set out herein are generally applicable with respect to regular (non-class) proceedings.

There is no absolute time limit for the duration of the procedure. To facilitate a timely completion of the procedure, however, several procedural deadlines are set out by the Civil Procedure Act (eg, the court must complete the preliminary examination of the claim within 30 days of its filing; the court has 30 days from the date of filing of the statement of claim to schedule a date for the court hearing and the first hearing must be scheduled to take place within four months following the date of filing the statement of claim).

In addition, the Civil Procedure Act provides for a general rule pursuant to which a civil procedure must be completed within a reasonable period of time.

- 16** What are the relevant limitation periods?

Proceedings based on the Competition Act must be initiated within six months after becoming aware of, but not later than within five years after, the breach of the Competition Act. Claims for damages on the basis of other competition law provisions, such as cartels or abuse of a dominant position, etc, (see question 4) may only be filed by the plaintiff within five years of the date of occurrence of the damage or – if the plaintiff was unable to exercise his or her rights for justifiable reasons – within an additional one-year period as of the date when the reason which prevented him or her from exercising his or her rights ceases to exist.

- 17** What appeals are available?

In the case of claims for cease and desist orders and damages based on the breach of provisions relating to unfair market practices (chapter II of the Competition Act), appeals must be filed with the relevant regional court. In the case of damages claimed on the basis of a breach of the provisions of chapters III-V of the Competition Act, appeals must be filed with:

- the relevant county court if the appeal is against a decision of a local court; or
- the relevant regional court if the appeal is against a decision of a county court.

Appeals must be filed within 15 days of the date of the receipt of the written decision of the court of first instance.

An extraordinary appeal for the review of the second instance decision by the Supreme Court is only available on questions of law (to be filed within 60 days after the receipt of the written decision of the court of second instance).

Class proceedings

- 18** Are class proceedings available in respect of antitrust claims?

Class actions comparable to US class proceedings are not available under Hungarian civil procedural law. There are, however, certain possibilities for combining the claims of different plaintiffs against the same defendant(s).

Two or more plaintiffs may initiate a joint action against the same defendant(s) if:

- the subject matter of the lawsuit is a joint right or obligation that may only be resolved consistently, or the court’s decision affects the plaintiffs or defendants irrespective of their participation in the procedure;
- the claims of the different plaintiffs are based on the same legal relationship; or
- the plaintiffs’ claims have a similar legal and factual basis and the same court has competence for all defendants.

In the event of a procedure initiated by a joint action of several plaintiffs only one procedure will be pending, but, in contrast to class proceedings, the claims of the plaintiffs will be separately resolved by the court. The plaintiffs are generally free to perform procedural acts independently of one another. The court may consolidate related actions to one procedure either ex officio or at the request of the parties.

Further, a consumer protection organisation, the Competition Office or an economic chamber, may introduce a civil law claim on behalf of consumers against any person who caused damage to a large number of consumers or caused significant damage to consumers by an activity violating an Act of Parliament. The Competition Office may enforce such a claim only if it has competence for such cases and has already established a breach of the Competition Act, which can be a cartel or a dominant position case. Claims may be filed with the court within one year of the date of the breach. The court may require the defendant to lower the price, to repair or replace the product or to refund the price. The court may also authorise the plaintiff to publish the court’s judgment in a national daily newspaper at the defendant’s cost. The defendant must perform the obligation(s) ordered by the court as regards each consumer, as required in the judgment. Consumers may enforce related civil law claims (eg, claims for damages) in separate lawsuits. To date, the Competition Office has not filed such an action.

19 Are class proceedings mandated by legislation?

Not applicable.

20 If class proceedings are allowed, is there a certification process? What is the test?

Not applicable.

21 Have courts actually certified class proceedings in antitrust matters?

Not applicable.

22 Are 'indirect claims' permissible in class and non-class proceedings?

A party suffering damage is entitled to full compensation including actual damages, justified expenses and lost profit. It therefore appears that indirect claims are permissible. Whether an indirect claim is permissible in fact will be decided by the court on a case-by-case basis upon considering all the circumstances of the case (eg, causality). In practice, however, Hungarian courts tend to be reluctant to award compensation for indirect claims.

23 Can plaintiffs opt out?

Not applicable.

24 Do class settlements require judicial authorisation?

Not applicable.

25 If the country is divided into multiple jurisdictions, is a national class proceeding possible?

Not applicable.

26 Has a plaintiffs' class-proceeding bar developed?

Not applicable.

Remedies

27 What forms of compensation are available and on what basis are they allowed?

The party suffering damage is entitled to full compensation (including actual damages, justified expenses and lost profit). Generally, the party causing the damage must restore the situation which existed prior to the occurrence of the damage. If this is not possible, it must compensate the other party for both material and non-material damage. The compensation must primarily be in the form of cash, except for cases when the circumstances justify natural compensation.

28 What other forms of remedy are available?

Hungarian civil procedural law recognises remedies and measures which may be requested even at the initial stages of, or during, the proceedings, such as partial or interim verdicts or preliminary injunctions.

A partial verdict is a decision passed by the court with respect to certain separate claims or parts of a claim which can be separately resolved, provided that there is no need for further trial in

this respect and the hearing in respect of another claim or a claim for an offset must be delayed.

An interim verdict is a decision passed by the court with respect to the legal grounds of a claim prior to actually passing a decision on the amount of such claim.

Preliminary injunctions, which serve the purpose of preventing the plaintiff from suffering damage until a final ruling is delivered, are also available. A preliminary injunction remains in effect until the court repeals it at the request of one of the parties or in the final decision passed with respect to the merits of the case. In Hungary, preliminary injunctions are permitted only within the framework of a lawsuit and may be requested only after or simultaneously with the filing of the statement of claim.

29 Are punitive or exemplary damages available?

Punitive or exemplary damages are not available under Hungarian law.

30 Is there provision for interest on damages awards?

Based on judicial practice, the party causing the damage must pay interest equal to the base rate of the National Bank of Hungary as from the date of the occurrence of the damage.

31 Are fines imposed by competition authorities taken into account when settling damages?

Fines imposed by competition authorities are not taken into account when settling damages.

32 Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

The court must resolve the legal costs in its decision on the merits of the case or in its decision closing the procedure. Generally, the party who lost the case must bear the costs of the proceedings including the legal costs. The plaintiff, however, must bear its own legal costs if the defendant did not provide a cause for the action and acknowledged the plaintiff's claim during the first court hearing at the latest. Further, in the event of a partially favourable result of the lawsuit, the legal costs must be borne by the parties in proportion to the claims successfully recovered in the procedure.

33 Is liability imposed on a joint and several basis?

If several individuals or entities have jointly caused damage, they are jointly liable for the whole damage. This means that the party suffering the damage may claim the whole amount of the damages from all or any of the defendants. The court may, however, decide that the persons who caused the damage are liable and must provide compensation in proportion to their contribution in causing the damage, provided that this does not prejudice the compensation of the party suffering the damage.

34 Is there a possibility for contribution and indemnity among defendants?

The obligation to provide compensation for the damage caused jointly by more than one person will be apportioned between the defendants according to their accountability. This rule does not apply when it is not possible to determine the defendants' contribution in causing the damage. In such case the compensation must be provided in equal shares by the damaging parties.

Update and trends

In Hungary recently there have been many discussions and consultations dealing with private actions for damages suffered as a result of infringements of the competition rules and the obstacles of the current system. In 2006, the Competition Law Research Centre was established at the Pázmány Péter Catholic University with the aim of creating a forum for competition lawyers and economists to debate controversial issues arising in the field of competition law. Private enforcement is one of the most important issues in which the Centre has started research. The research focuses inter alia on the following main issues: private enforcement in general; which methods may be used for calculating the quantum of damages; the applicability of the general rules of liability in damages in respect of damages caused outside contractual relations and of those caused in the context of contractual relations (whether it is possible to apply the rules of breach of contract in case of cartels or agreements restricting economic competition; whether a party to an

agreement restricting economic competition may file a claim for damages against the other parties of the agreement; whether a third party may file a claim for damages with regard to an agreement restricting economic competition); the causality between the breach and the damage; and public and private enforcement. The memorandum on the findings of the research will be issued by the end of 2007. The Competition Authority also announced a tender in 2007 for researching certain issues of private enforcement. The tender addresses almost the same issues as the research plan of the Competition Law Research Centre. Currently these are the most relevant topics in Hungary which are considered to be the obstacles to a more efficient system of competition law related damages claims. Such discussions and research aim to improve the conditions for antitrust damages claims. The Green Paper and the questions raised therein may also have a great impact on the improvement of the Hungarian private enforcement.

If one of the persons who caused the damage jointly provides compensation in excess of its own proportion of accountability, such person would have a claim against the other parties who caused the damage on a pro rata basis.

35 Is the 'passing on' defence taken into account?

A 'passing on' defence is neither recognised by Hungarian case law nor legislation, and it is as yet uncertain how Hungarian courts would respond to this kind of defence.

36 Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

There are no other specific forms of defence in Hungary for the purposes of antitrust cases constituted either by statute or case law.

37 Are there alternative means of dispute resolution available?

Hungarian law provides for general civil law mediation which is also possible with respect to competition law issues. General civil law mediation includes practically all types of civil lawsuits with only specific exceptions, such as administrative lawsuits, defamation cases and certain family law issues. Private antitrust enforcement is, however, generally not conducted through mediation.

CHSH

Cerha Hempel Spiegelfeld Hlawati

**Contacts: Judith Vadász
Bernhard Kofler Senoner**

**e-mail: judit.vadasz@chsh.at
e-mail: bernhard.kofler-senoner@chsh.at**

Parkring 2
1010 Vienna
Austria

Tel: +36 1 345 45 35 / +43 1 514 35 0
Fax: +36 1 345 45 43 / +43 1 514 35 35
Website: www.chsh.at